

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

The Berkshire Gas Company

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D.T.E. 01-56

**MOTION OF THE ATTORNEY GENERAL TO DISMISS THE PETITION OF THE
BERKSHIRE GAS COMPANY AND IN THE ALTERNATIVE TO BIFURCATE THE
PROCEEDING**

I. INTRODUCTION.

Pursuant to G. L. c. 164, §§1E, 94, 220 C.M.R. §1.06(6)(e) and Mass. R. Civ. P. 12(b)(6), the Attorney General of Massachusetts requests that the Petition of the Berkshire Gas Company (“Berkshire” or “Company”) be dismissed. Berkshire has failed to plead an adequate complaint for relief. The Department clearly and unequivocally required that gas distribution companies, such as Berkshire, include service quality (“SQ”) measures as part of their next rate filing under G. L. c. 164, §94. The Company has expressly refused to file the mandated SQ plan with its petition. Given the statutory requirement of service quality standards under G. L. c. 164, §1E and the extensive proceedings devoted to their promulgation, the Company should not be permitted to ignore the Department’s order and the directives of the Legislature in the very first rate filing to address this important feature of the Restructuring Act. 1997 Mass. Acts Ch. 164. The Company has offered no explanation for why Berkshire has declined to comply. The entire petition contains virtually no testimony discussing SQ measures beyond a passing reference that the Company will “accomodate” the

Department precedent at some unspecified future date.

As explained fully below, Berkshire's petition should be immediately dismissed. In the alternative, the Department should bifurcate the proceeding to reserve for a second phase the PBR component of the filing.

II. BACKGROUND

On June 29, 2001, the Department issued an Order that stated:

With SQ guidelines established, the Department now directs each gas and electric distribution company who files a petition under G. L. c. 164, § 94 for a general rate increase to include a PBR plan containing the SQ measures developed in these proceedings. If a gas or electric distribution company submits a PBR plan that deviates from these SQ guideline, that company shall provide full and complete support for its proposal and the reasons for any departure from the SQ guidelines stated herein.

Service Quality Standards, D.T.E. 99-84, p. 41 (2001). This Order also contained an attachment that detailed the exact service quality standards required by the Department. *Id.*, Appendix. On July 17, 2001, the Company filed a rate case under G. L. c 164, §94, including a PBR mechanism. As for its obligation to comply with this order on SQ standards, the Company offered the following statement:

Customer service standards and reliability standards form an important part of a comprehensive incentive ratemaking plan. Berkshire plans to accommodate the generic requirements that Massachusetts has recently established by supplementing its PCM filing at a *later date*. [emphasis added]

Harrison testimony, p. 29. In a footnote the Company expressly acknowledged that the Department had issued a final order on SQ measures in D.T.E. 99-84. *Id.*, n.16. The remainder of the single page of testimony devoted to this topic merely discussed in very general terms the theory and policy goals role of SQ measures in a PCM model. Harrison testimony, p.29.

II. STANDARD OF REVIEW

A. A Claim Must Be Based On Facts Plead In the Complaint.

In evaluating the legal sufficiency of a complaint in the face of a motion to dismiss, the Department has explicitly adopted the standards used by the courts under Mass. R. Civ. P. 12(b)(6):

The Department's current standard for ruling on a motion to dismiss for failure to state a claim upon which relief can be granted is applicable to the instant Motion to Dismiss and Motion for Hearing of the Motion to Dismiss. In Riverside Steam & Electric Company, D.P.U. 89-123, at 26-27 (1988), the Department denied the respondent's motion to dismiss, finding that it did not "appear[] beyond doubt that [the petitioner] could prove no set of facts in support of its petition," and, in doing so, adopted the traditional Rule 12(b)(6) civil standard. Id., see Mass. R. Civ. P. Rule 12(b)(6); see also Nader v. Citron, 372 Mass. 96, 98 (1988).

Stow Municipal Light v Hudson, D.P.U. 93-124-A, 4-5 (1993). Department precedent clearly supports dismissal of an case when a petition excludes materials required to be included by the Department. *Dedham Water Company*, D.P.U. 85-119, p. 16-20 (1985) (dismal without prejudice of rate petition appropriate remedy when company fails to file with its initial case materials required by Department directives). The plaintiff's claim must be based on facts set forth in the complaint and all materials outside the pleadings are excluded from this review. *General Motors Acceptance Corp. v. Abington Casualty Ins. Co.*, 413 Mass. 583, 584, 602 N.E.2d 1085 (1992). In evaluating a complaint for purposes of a motion to dismiss, the court will look at the four corners of the complaint as well as any documents that are incorporated by reference and attached to the complaint, but not "oral representations and extraneous materials not incorporated by reference" into the complaint. *Mmoe v.*

Commonwealth, 393 Mass. 617, 620, 473 N.E. 2d 169 (1985) ("Pleadings must stand or fall on their own").

III. ARGUMENT.

A. **Berkshire Has Not Plead A Claim For Relief In Compliance With Department Precedent And Massachusetts Statutory Law.**

The Department's requirement of including SQ measures as part of any new gas rate case filed is mandatory. *Service Quality Standards*, D.T.E. 99-84, p. 40-42; ; *See Boston Gas Company*, D.P.U. 96-50 (Phase I), p. 309-310 (1996) (announcing standards); *Fitchburg Gas & Electric Light Company*, D.T.E. 98-51, pp. 6-7 (1998) (requiring filing of a SQ plan). Although the Company is entitled to all reasonable inferences in its favor in the face of a motion to dismiss, Berkshire has neither provided the requested SQ plan, nor explained in any manner why the plan had not been included in the original filing. Instead, Berkshire commits to supplement its "PCM filing at a *later* date." Harrison testimony, p.29 (emphasis added). The Company plead that it bluntly refused to comply with the Department's directives for implementing the requirements of G. L. 164, §1E. Consequently, the petition must be dismissed. *Dedham Water Company*, D.P.U. 85-119, p. 16-20.

The Department's order on service quality speaks repeatedly of companies submitting a SQ "plan" with any new rate petition and directs utilities with existing SQ plans to modify them to include the new SQ measures within four months of the order. *Service Quality Standards*, D.T.E. 99-84, p. 40-42. Certainly, "[t]he Department now seeks implementation of the guidelines established in the order as soon as practical." *Id.*, p. 42. Any utility departing from the Department's guidelines must provide a full, accurate and detailed explanation. *Id.* Given the vagaries of SQ data collection and the

host of issues that will surely emerge during the implementation of the SQ measures and the application of the penalty mechanisms, it seems entirely reasonable to require, as the Department has directed, that a utility include a SQ plan with its rate petition. Berkshire has simply exempted itself from this requirement without explanation and effectively deprived interveners of the full rate suspension period to investigate the SQ plan, if one exists at all.

B. Information Outside The Complaint Must Not Be Considered In A Motion To Dismiss.

It is well settled law that the plaintiff's claim must be based on facts set forth in the complaint and all materials outside the pleadings are excluded from this review. *General Motors Acceptance Corp. v. Abington Cas. Ins. Co.*, 413 Mass. at 584, 602 N.E.2d 1085. Oral statements and extraneous materials are not to be considered. *Mmoe v. Commonwealth*, 393 Mass. at 620, 473 N.E. 2d 169. Since the Company refused to plead a SQ plan in its petition and instead stated that it would file a plan “later” without further explanation, the Attorney General and other parties would be forced to try to use the discovery process to compel the Company to comply with the Department’s order.¹ However, since such information comes from outside the pleadings, Berkshire may not rely upon it to defend against a motion to dismiss. Under the controlling standards of review, the Department must look only to the “four corners” of the complaint to evaluate whether a request for relief has been properly plead.

¹ By forcing the parties, including the Department, to use discovery devices to extract the SQ plan from the Company, Berkshire seems to give very little deference to the Department’s order in D.T.E. 99-84 or other Department precedent.

IV. CONCLUSION

Under the controlling authorities regarding motions to dismiss, the Company's petition contains fatal flaws. Consequently, this motion should be allowed.

Wherefore: The Attorney General requests that Berkshire Petition be dismissed without prejudice to refile upon compliance with the relevant Department orders.

In the alternative, the Attorney General requests that the proceeding be bifurcated to allow the PBR portion of the Company's petition to continue in a second phase. .

RESPECTFULLY SUBMITTED,

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